United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM
8: - **Chapter**

#0.00 **All hearings on this calendar will be conducted using ZoomGov video and audio.**

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10:00 AM
CONT... **Chapter**

https://www.cacb.uscourts.gov/judges/honorable-theodor-c-albert under the "Telephonic Instructions" section.

To assist in creating a proper record and for the efficiency of these proceedings, please:

- Connect early so that you have time to check in.
- Change your Zoom name to include your calendar number, first initial and last name, and client name *(ex. 5, R. Smith, ABC Corp.)* if appearing by video. This can be done by clicking on "More" and "Rename" from the Participants list or by clicking on the three dots on your video tile.
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- Say your name every time you speak.
- Disconnect from the meeting by clicking "Leave" when you have completed your appearance(s).

Docket 0

Tentative Ruling:

- NONE LISTED -

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM
8:09-12450 Kristine Lynne Adams **Chapter 7**
Adv#: 8:16-01238 Newport Crest Homeowners Association, Inc. v. Adams

#1.00 STATUS CONFERENCE After Appeal RE: Complaint
(cont'd from 2-11-21 per order on stip. to cont. s/c entered 12-18-20)

Docket 1

Tentative Ruling:

Tentative for 3/25/21:
Status? Is the case settled? Will there be a stipulation?

Tentative for 10/29/20:
Pleadings are apparently not yet at issue, so all new counterclaims etc. that are going to be filed should be within thirty days and any responsive pleadings thereto within 21 days thereafter. Court will set deadlines for case management at continued status conference January 28, 2021 @ 10:00 a.m.

Party Information

Debtor(s):

Kristine Lynne Adams	Pro Se

Defendant(s):

Kristine Lynne Adams	Pro Se

Plaintiff(s):

Newport Crest Homeowners	Represented By Todd C. Ringstad Brian R Nelson Christopher Minier

Trustee(s):

Weneta M Kosmala (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM
8:19-12162 John Louis Katangian **Chapter 11**
Adv#: 8:19-01181 City of Los Angeles v. Katangian

#2.00 STATUS CONFERENCE RE: Complaint to Determine Non-dischargeability of Debt
(cont'd from 12-03-20)

Docket 1

Tentative Ruling:

Tentative for 3/25/21:
The court will issue a stay of the proceeding pending results of the state court appeal.

Tentative for 12/3/20:
The court is not inclined to merely wait while an appeal of the state court judgment proceeds, which could take years, but since there seems to be some recognition of a possible settlement, the status conference may be continued to February 11 @ 10:00 a.m. at which time the parties can expect that deadlines will be imposed at that time. Of course, a Rule 56 motion can also be filed as appropriate in meantime.

Appearance: required

Tentative for 12/5/19:
Status conference continued to March 5, 2020 at 10:00AM. Appearance waived.

Party Information

Debtor(s):

John Louis Katangian — Represented By
Michael R Totaro

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
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Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM

CONT... John Louis Katangian **Chapter 11**

Defendant(s):

Shelline Marie Katangian — Pro Se

Joint Debtor(s):

Shelline Marie Katangian — Represented By
Michael R Totaro

Plaintiff(s):

City of Los Angeles — Represented By
Wendy A Loo

10:00 AM
8:19-12052 Deborah Jean Hughes **Chapter 7**
Adv#: 8:19-01228 Marshack v. Hughes et al

#3.00 STATUS CONFERENCE RE: Complaint For:
I. Denial Of Discharge Pursuant To 11 U.S.C. Sec. 727(a)(2-7);
II. Turnover Of Real Property Pursuant To 11 U.S.C. Section 542;
III. Turnover Of Funds Pursuant To 11 U.S.C. Sec. 542 & 543;
IV. Avoidance Of A Preferential Transfer Pursuant To 11 U.S.C. Sec. 547;
V. Avoidance Of A Preferential Transfer Pursuan To 11 U.S.C. Sec. 548;
VI. Avoidance Of A Post-Petition Transfer Pursuant To 11 U.S.C. Sec. 549
(cont'd from 7-30-20)
(cont'd from 1-14-21 per order on stip. to allow defendants until March 1, 2021 to file a firsrt responding document and to cont. the s/c currently set for january 14, 2021 entered 1-12-21)

Docket 1

Tentative Ruling:

Tentative for 3/25/21:
Continue to coincide with motion to approve compromise filed March 9.

Tentative for 7/30/20:
See #12.1

Tentative for 6/3/20:
Continue per stipulation (not yet received).

Why no status report? The status conference has been continued by stipulation to June 4, 2020 at 10:00 a.m. as to Timothy Hughes, Jason Hughes, and Betty McCarthy. It remains on calendar to address any concerns of the non-signatory and then will be continued to June 4, 2020 at 10:00 a.m.

United States Bankruptcy Court
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Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM

CONT... Deborah Jean Hughes **Chapter 7**

Party Information

Debtor(s):

Deborah Jean Hughes	Represented By Matthew C Mullhofer

Defendant(s):

Deborah Jean Hughes	Pro Se
Timothy M Hughes	Pro Se
Jason Paul Hughes	Pro Se
Betty McCarthy	Pro Se

Plaintiff(s):

Richard A Marshack	Represented By Anerio V Altman

Trustee(s):

Richard A Marshack (TR)	Represented By Anerio V Altman

10:00 AM
8:20-10545 Katie Ki Sook Kim **Chapter 7**
Adv#: 8:20-01093 Romex Textiles, Inc. v. Kim

#4.00 STATUS CONFERENCE RE: Complaint to determine dischargeability of a debt and objection to discharge
(case reassigned from Judge Catherine E. Bauer per admin order 20-07 dated 7-15-20)
(cont'd from 2-25-21)

Docket 1

Tentative Ruling:

Tentative for 3/25/21:
Status?

Tentative for 2/25/21:
Status? Default entered?

Appearance: optional

Tentative for 1/28/21:
Status on entry of default? Appearance: optional

Tentative for 12/3/20:
Continue to January 28, 2021 @ 10:00 a.m. to permit appearance by defendant and a meaningful joint status report, or entry of default as appropriate

Appearance: optional

10:00 AM
CONT... Katie Ki Sook Kim **Chapter 7**

Tentative for 9/3/20:
Per request, continued to December 3 @ 10:00 a.m. Plaintiff to give notice.

Party Information

Debtor(s):

Katie Ki Sook Kim	Represented By Joon M Khang

Defendant(s):

Katie Ki Sook Kim	Pro Se

Plaintiff(s):

Romex Textiles, Inc.	Represented By Nico N Tabibi

Trustee(s):

Richard A Marshack (TR)	Represented By Anerio V Altman

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM

8:20-11327 Heather Huong Ngoc Luu **Chapter 7**

Adv#: 8:20-01117 E-Z Housing Group LLC v. Luu

#5.00 STATUS CONFERENCE RE: Complaint to Determine Dischargeability of Debt and Judgment for Fraud, Actual Fraud, False Pretenses, False Representation and Actual Fraud 11 USC Section 523(a)(2)(A) and Willful and Malicious Injury 11 USC Section 523(a)(6)
(cont'd from 2-25-21)

Docket 1

Tentative Ruling:

Tentative for 3/25/21:
When will the default judgment motion with supporting papers be filed?

Tentative for 2/25/21:
What is status of default judgment application?

Tentative for 1/28/21:
Status on filing of motion supporting default judgment? Appearance: optional

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Tentative for 12/10/20:
Continue to January 28, 2021 @ 10:00 a.m. to allow processing of default judgment.

Party Information

Debtor(s):

Heather Huong Ngoc Luu Represented By
Joshua R Engle

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
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Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM

CONT... Heather Huong Ngoc Luu **Chapter 7**

Defendant(s):

Heather Huong Ngoc Luu	Pro Se

Plaintiff(s):

E-Z Housing Group LLC	Represented By Fritz J Firman

Trustee(s):

Thomas H Casey (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM

8:18-11154 i.i. Fuels, Inc. **Chapter 7**

Adv#: 8:21-01001 Marshack v. American Express National Bank

#6.00 STATUS CONFERENCE RE: Complaint For: 1) Avoidance of Transfers Pursuant to 11 USC Section 544(b) and Cal. Civ. Code Sections 3439.04(a)(2), 3439.05; 2) Avoidance of Transfers Pursuant to 11 USC Section 548(a)(1)(B); 3) Recovery of Avoided Transfers Pursuant to 11 USC Section 550; and 4) Disallowance of Claims Pursuant to 11 USC Section 502

Docket 1

***** VACATED *** REASON: CONTINUED TO 5-27-21 At 10:00 A.M. PER ORDER APPROVING STIPULATION TO EXTEND RESPONSE DATE TO PLAINTIFF'S AMENDED COMPLAINT AND CONTINUE STATUS CONFERENCE ENTERED 3-16-21**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

i.i. Fuels, Inc.	Represented By Leonard M Shulman

Defendant(s):

American Express National Bank	Pro Se

Plaintiff(s):

Richard A. Marshack	Represented By Robert P Goe

Trustee(s):

Richard A Marshack (TR)	Represented By Robert P Goe Rafael R Garcia-Salgado

United States Bankruptcy Court
Central District of California
Santa Ana
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Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM

8:18-11154 i.i. Fuels, Inc. **Chapter 7**

Adv#: 8:21-01002 Marshack v. Swift Financial Corporation et al

#7.00 STATUS CONFERENCE RE: Complaint For: 1) Usury; 2) Unconscionability; 3) Negligence Per Se--Violation of California Finance Lending Law; 4) Violation of California Business and Professions Code Section 17200; 5) Unjust Enrichment/Disgorgement; 6) Fraud; 7) Avoidance and Recovery of Fraudulent Transfers Pursuant to 11 USC Section 544(b) and Cal. Civ. Code Sections 3439.04(a)(2), 3439.05; 8) Determination of Liens Pursuant to 11 USC Sections 502, 506 and 551; and 9) Injuction and Declaratory Relief

Docket 1

***** VACATED *** REASON: CONTINUED TO 5-27-21 AT 10:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE STATUS CONFERENCE ENTERED 3-10-21**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

i.i. Fuels, Inc.	Represented By Leonard M Shulman

Defendant(s):

Swift Financial Corporation	Pro Se
Paypal, Inc.	Pro Se

Plaintiff(s):

Richard A Marshack	Represented By Robert P Goe

Trustee(s):

Richard A Marshack (TR)	Represented By Robert P Goe Rafael R Garcia-Salgado

10:00 AM
8:18-10582 David R. Garcia **Chapter 7**
Adv#: 8:18-01105 Jafarinejad v. Garcia

#8.00 PRE-TRIAL CONFERENCE RE: Complaint to Determine Dischargeability of Debt
(con't from 9-10-20 per stip. & order entered 8-07-20)

Docket 1
***** VACATED *** REASON: CONTINUED TO 5-06-21 AT 11:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE PRE-TRIAL CONFERENCE AND DEADLINE TO FILE PRE-TRIAL MOTIONS ENTERED 3-17-21**

Tentative Ruling:

Tentative for 12/5/19:
Status?

Tentative for 1/31/19:
Deadline for completing discovery: May 1, 2019
Last date for filing pre-trial motions: May 20, 2019
Pre-trial conference on: June 6, 2019 at 10:00am
Joint pre-trial order due per local rules.

Tentative for 11/29/18:
See #10.

Tentative for 10/25/18:
Status conference continued to November 29, 2018 at 2:00 p.m. to coincide with OSC, now that one will be lodged as requested.

10:00 AM

CONT... David R. Garcia **Chapter 7**

Tentative for 8/30/18:
Status conference continued to October 25, 2018 at 10:00 a.m. Why didn't defendant participate in preparing the status report? Plaintiff should prepare an OSC re sanctions, including striking the answer, for hearing October 25, 2018 at 10:00 a.m.

Party Information

Debtor(s):

David R. Garcia	Represented By Thomas J Tedesco

Defendant(s):

David R. Garcia	Represented By Donald Reid Charity J Manee

Plaintiff(s):

Mandana Jafarinejad	Represented By Mani Dabiri

Trustee(s):

Weneta M Kosmala (TR)	Pro Se

United States Bankruptcy Court
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Santa Ana
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Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM

8:19-11359 Ronald E. Ready **Chapter 7**

Adv#: 8:19-01154 Paramount Residential Mortgage Group Inc v. Ready

#9.00 PRE-TRIAL CONFERENCE RE: Complaint for Nondischargeability of Debt Pursuant to 11 U.S.C. Section 523(a)(2) and 11 U.S.C. Section 523(a)(6)
(con't from 1-28-21 per order appr. stip. to con't entered 1-27-21)

Docket 1

***** VACATED *** REASON: CONTINUED TO 4-22-21 AT 10:00 A.M. PER ORDER APPROVING THE STIPULATION TO CONTINUE PRE-TRIAL CONFERENCE ENTERED 3-09-21**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Ronald E. Ready	Represented By Joseph A Weber Fritz J Firman

Defendant(s):

Ronald E Ready	Represented By Fritz J Firman

Plaintiff(s):

Paramount Residential Mortgage	Represented By Shawn N Guy

Trustee(s):

Jeffrey I Golden (TR)	Pro Se

10:00 AM

8:20-10045 Young Ha Kim **Chapter 7**

Adv#: 8:20-01056 The Wheel and Tire Club, Inc. v. Kim

#10.00 PRE-TRIAL CONFERENCE RE: Complaint for non-dischargeability of debt owed to the Wheel and Tire Club, Inc. dba Discounted Wheel Warehouse
(case reassigned from Judge Catherine E. Bauer per admin order dated 7-15-20)
(set from s/c hrg held on 10-15-20)

Docket 1

***** VACATED *** REASON: CONTINUED TO 4-08-21 AT 10:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE PRE-TRIAL CONFERENCE ENTERED 3-09-21**

Tentative Ruling:

Tentative for 10/15/20:
Deadline for completing discovery: January 29, 2021
Last date for filing pre-trial motions: February 12, 2021
Pre-trial conference on: March 25, 2021 @ 10:00 a.m.
Joint pre-trial order due per local rules.

Party Information

Debtor(s):

Young Ha Kim	Represented By Christian T Kim

Defendant(s):

Young Ha Kim	Pro Se

Plaintiff(s):

The Wheel and Tire Club, Inc.	Represented By Mark D Holmes

Trustee(s):

Weneta M Kosmala (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM
8:19-10814 M3Live Bar & Grill, Inc. **Chapter 7**
Adv#: 8:20-01108 Karen Sue Naylor v. Wosoughkia et al

#11.00 PRE-TRIAL CONFERENCE RE:.Complaint For: 1. Mandatory Subordination of Claim Pursuant to 11 U.S.C. Section 510(b); and, 2. Transfer of Judgment Lien to the Estate Nature of Suit: (81 (Subordination of claim or interest))
(set from s/c hrg held on 10-01-20)

Docket 1
***** VACATED *** REASON: CONTINUED TO 6-24-21 AT 10:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE DISCOVERY CUT-OFF DATE. DEADLINE FOR PRE-TRIAL MOTIONS AND PRE-TRIAL CONFERENCE, PENDING COMPLETION OF MEDIATION ENTERED 1-20-21**

Tentative Ruling:

Tentative for 10/1/20:
Discovery cutoff Dec. 31, 2020. Last date for pretrial motions January 29, 2021. Pretrial conference February 11, 2021.

Party Information

Debtor(s):

M3Live Bar & Grill, Inc.	Represented By Robert P Goe Ryan S Riddles Carl J Pentis

Defendant(s):

Fariborz Wosoughkia	Pro Se
Natasha Wosoughkia	Pro Se

Plaintiff(s):

Karen Sue Naylor	Represented By Nanette D Sanders

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
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Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM

CONT... M3Live Bar & Grill, Inc. **Chapter 7**

Trustee(s):

Karen S Naylor (TR)

Represented By
Nanette D Sanders
Todd C. Ringstad

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM

8:19-10158 BP Fisher Law Group, LLP **Chapter 7**

#12.00 PRE-TRIAL CONFERENCE RE: Lexington National Insurance Corporation's Objection To And Motion To Disallow Proof Of Claim No. 51 Filed By Lakeview Loan Servicing, LLC
(set from s/c hrg held on 11-03-20)

Docket 249

***** VACATED *** REASON: OFF CALENDAR - ORDER APPROVING STIPULATION BETWEEN LEXINGTON NATIONAL INSURANCE CORPORATION AND LAKEVIEW LOAN SERVICING, LLC RESOLVING THE OBJECTION TO AND MOTION TO DISALLOW PROOF OF CLAIM #51 ENTERED 3-08-21**

Tentative Ruling:

Tentative for 11/3/20:
The court will consider suggestions for deadlines.

Party Information

Debtor(s):

BP Fisher Law Group, LLP — Represented By
Marc C Forsythe

Trustee(s):

Richard A Marshack (TR) — Represented By
D Edward Hays
David Wood

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

10:00 AM
8:19-10158 BP Fisher Law Group, LLP **Chapter 7**

#13.00 PRE-TRIAL CONFERENCE RE: Lexington National Insurance Corporation's Objection To And Motion To Disallow Proof Of Claim No. 53 Filed By Lakeview Loan Servicing, LLC
(set s/c hrg held on 11-03-20)

Docket 251
***** VACATED *** REASON: OFF CALENDAR - ORDER APPROVING STIPULATION BETWEEN LEXINGTON NATIONAL INSURANCE CORPORATION AND LAKEVIEW LOAN SERVICING, LLC RESOLVING THE OBJECTIONS TO AND MOTION TO DISALLOW PROOF OF CLAIM NO. 53 ENTERED 3-02-21**

Tentative Ruling:

Tentative for 11/3/20:
See #8.

Party Information

Debtor(s):

BP Fisher Law Group, LLP — Represented By
Marc C Forsythe

Trustee(s):

Richard A Marshack (TR) — Represented By
D Edward Hays
David Wood

11:00 AM

8:18-13894 Daniel J Powers **Chapter 13**

Adv#: 8:19-01046 Powers et al v. Alamitos Real Estate Partners II, LP

#14.00 Plaintiff's Motion For Attorney's Fees After Judgement As Prevailing Parties

Docket 60

Tentative Ruling:

Tentative for 3/25/21:

This is plaintiffs/debtors, Daniel and Ellen Powers' ("Debtors") motion for attorney's fees after judgement as prevailing parties. The motion is opposed by defendant, Alamitos Real Estate Partners II, LP ("Alamitos"). By this motion, Debtors request that the court approve attorney's fees in the amount of $332,275.00, which is the product of the lodestar amount ($132,910) and a multiplier of 2.5 to compensate Debtors' counsel for taking the case on contingency and preserving more money for the estate by defeating Alamitos. A detailed factual recitation of this case is contained in this court's memorandum of decision and is incorporated by reference.

It is best to begin by observing that per the notice of motion, the opposition was undeniably filed late, which causes the court to consider disregarding it as this court expects its rules to be observed. Furthermore, Debtors' counsel asserts that failing to timely file an opposition was a deliberate decision by Alamitos. Alamitos does not offer any reason why the failure to timely oppose the motion should be overlooked.

However, giving Alamitos the benefit of the doubt, a few issues are apparently unopposed. There is no dispute that California Code of Civil Procedure §1717 is the operative statute. There is no dispute regarding the Debtors' status as the prevailing party and, as such, that they are entitled to reasonable attorney's fees under the various contracts. There is also no direct dispute regarding Debtors' use of a multiplier of 2.5 to calculate Debtors' attorney's fees (but the court has its own doubts as discussed below). Rather,

Alamitos focuses on the lodestar request as excessive.

The disagreement in this motion has to do with alleged excessive, duplicative, and unreasonable billing by Debtors' counsel in certain categories. Alamitos argues that the court should cut the attorney's fees award by 33% across the board.

Three conditions must be satisfied under California Code of Civil Procedure § 1717. "First the action in which the fees are incurred must be an action 'on a contract', a phrase that is liberally construed. Second, the contract must contain a provision stating that attorney's fees incurred to enforce the contract shall be awarded either to one of the parties or to the prevailing party. And third, the party seeking fees must be the party who 'prevail[ed] on the contract', meaning… 'the party who recovered a greater relief in the action on the contract.' Cal. Civ Code § 1717(b)(1)." See *In re Penrod*, 802 F.3d 1084, 1087-88 (2015) ("Whether [creditor] actually would have sought attorney's fees had it prevailed (something it denies) is immaterial. What matters is whether it could have sought fees under the contract, and here it could indeed have done so.") *Penrod*, 802 F.3d at 1090.

Where one side obtains a judgment that is a "simple, unqualified win" on solely a contract claims, a "trial court ha[s] no discretion to deny [those parties] their attorney's fees under section 1717[.]" *Hsu v. Abbara*, 9 Cal. 4th 863, 876 (1995). Thus, "[w]hen a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action and the contract contains a provision for attorney fees, section 1717 entitles the successful party to recover *reasonable* attorney fees incurred in prosecution or defense of those claims." *Scott Co. v. Blount, Inc.*, 20 Cal. 4th 1103, 1109 (1999) (italics added). Additionally, while it is ordinarily true that a party can only be awarded attorneys' fees under Section 1717 for efforts to prevail on contract claims, such that fees spent on any other claims (like tort claims) are not recoverable, fees need not be apportioned when incurred for representation on issues common to contract and non-contractual claims that

are "inextricably intertwined." *Abdallah v. United Savings Bank,* 43 Cal. App. 4th 1101, 1111 (1996). That is, where a party pursues both contract and non-contract claims, but it is "impracticable, if not impossible, to separate the multitude of conjoined activities into compensable or non-compensable time units," apportionment is not necessary. *Id*. "Apportionment of a fee award between fees incurred on a contract cause of action and those incurred on other causes of action is within the trial court's discretion[.]" *Id*.

The lodestar-multiplier method begins with a calculation of time spent and reasonable hourly compensation of each attorney and paralegal who worked the case. Then to compensate counsel for risk, quality, and result, courts commonly apply a "multiplier" to the lodestar in awarding attorney's fees. California courts often increase the base lodestar with a multiplier after considering: (1) the continuing obligation of plaintiff's counsel to devote time and effort to the litigation; (2) the extent to which the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee agreement, both from the point of view of eventual success on the merits and securing an award; (4) the experience, reputation, and ability of the attorneys who performed the services, and the skill they displayed in litigation; (5) the amount involved and the results obtained on behalf of the class by client by plaintiff's counsel; and (6) the reaction of the class members. See *Serrano v. Priest*, 20 Cal. 3d 25, 49 (1977); *Dunk v. Ford Motor Co*. 48 Cal. App. 4th 1794, 1810 n.21. However, no rigid formula applies, and each factor should be considered only "where appropriate". See *Dept of Transp. v. Yuki* 31 Cal. App. 4th 1754, 1771 (1995); see also *Serrano*, 20 Cal. 3d at 49.

Alamitos puts forth very little that would persuade the court that Debtors' are requesting an unreasonable attorney's fee award, at least on the lodestar amount. For example, Alamitos argues that Debtor should not be allowed to recover attorney's fees for actions taken outside the adversary proceeding, *e.g.* fees incurred in opposing a motion for relief from the automatic stay. However, as Debtors point out, Alamitos was seeking relief from the automatic stay to enforce its contract, which seems to fit within a

liberal interpretation of "on a contract" within the meaning of section 1717. Obviously if the relief of stay had been granted the disruption to the estate, not to mention the viability of this action, would have been profound. Alamitos makes vague reference to other instances of billing on "unrelated" matters, but relief from the automatic stay is the only specific reference. Thus, Alamitos does not raise sufficient doubts that the fees requested are unreasonable as being wholly unrelated to the adversary proceeding.

Alamitos next argues that the court should, at least, reduce by half the fees incurred by Guarav Datta. Alamitos argues that this was a straightforward usury law matter and that Mr. Datta performed unnecessary and duplicative tasks adding up to $5,360. Alamitos also argues that these fees are not supported by Mr. Datta's time records. Debtors cite *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084, 1096 & n.4 (2000), where the court accepted a detailed reconstruction of time spent on certain legal tasks as PLCM did not keep daily billing records. Here, the motion is supported by Mr. Datta's declaration where he asserts that he spent a total of 26.8 hours on this matter at a billing rate of $200 per hour for a total of $5,360.00. However, the declaration, rather than being detailed, is fairly general as it lists tasks but gives the court no indication how much time was spent on each task. In bankruptcy matters this practice is described as "lumping" and is to be discouraged since it leaves the court very little basis with which to assess any item billed as reasonable. Thus, the court will reduce this portion of the fees by half, for a new total of $2,680.00.

Alamitos next complains that too much time is billed for what could be construed as clerical or administrative tasks. Indeed, Alamitos cites several cases from different circuits where courts held that attorneys cannot recover fees for tasks that are purely administrative or clerical in nature. In reply, Debtors do not cite countervailing authority, but only argue that since their counsel is a solo practitioner with little to no support staff, counsel used appropriate "billing judgment." Debtors also correctly point out that Alamitos does not identify any particular entry or entries that would be considered

administrative or clerical tasks. Alamitos also does not argue that any percentage of the fees should be reduced for this category. Thus, the court is not assisted in making any particular reduction for this category of objection.

Finally, Alamitos argues that Debtors' counsel, given his level of experience, spent much more time on this matter than was warranted given its allegedly straightforward issues. Alamitos specifies 15 individual time entries, totaling 64.6 hours that it alleges are excessive and unnecessary. Debtors assert that the case was more complex than Alamitos' characterization and that Debtors' counsel billed far less time than he spent working on it. Again, the court is given little assistance but both sides seem to be only appealing to the court's general sense of what is just.

Still, the court harbors its own doubts that the attorney's fees requested are reasonable, at least regarding the multiplier enhancement. The court notes that Debtors' counsel took this case on a contingency-like agreement (representing a debtor in a bankruptcy proceeding is often a *de facto* contingency), which carried the risk of recovering nothing for the many hours spent on the case. The court also notes that by defeating Alamitos in this adversary proceeding, there is likely a larger pot of money for creditors of the estate. Those two considerations weigh in favor of awarding some enhancement. However, the court also observes that this case was not unusually complex and did not involve novel issues of law requiring particularly deft handling or expertise. The court is also giving Debtors' counsel the benefit of the doubt on several categories of billing such that, at a minimum, most of the fees requested will be awarded. Still, 2.5 times the lodestar amount for a matter of this type as an enhnacement strikes the court as an unwarranted windfall and unduly harsh against Alamitos. Even two times seems excessive. The right balance is likely 1.5 times the lodestar amount ($132,910.00), which comes out to $199,365, less the 50% cut of the paralegal fees ($2,680), for a grand total of **$196,685.00**.

Award fees of $196,685 to plaintiffs.

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

11:00 AM

CONT... Daniel J Powers **Chapter 13**

Party Information

Debtor(s):

Daniel J Powers	Represented By Charles W Hokanson

Defendant(s):

Alamitos Real Estate Partners II, LP	Represented By Robert J Stroj

Joint Debtor(s):

Ellen A Powers	Represented By Charles W Hokanson

Plaintiff(s):

Ellen A Powers	Represented By Charles W Hokanson Robert J Stroj
Daniel J Powers	Represented By Charles W Hokanson Robert J Stroj

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

11:00 AM

8:20-12332 Christine Carlin **Chapter 7**

Adv#: 8:20-01162 Jason Frank Law PLC, a professional law corporatio v. Carlin et al

#15.00 Motion To Dismiss Adversary Proceeding Counter/Cross-Claims For Failure To State A Claim Upon Which Relief can be Granted **[F.R.C.P. Rule 12(b)(6)] (cont'd from 2-25-21)**

Docket 8

***** VACATED *** REASON: OFF CALENDAR - NOTICE OF AND REQUEST TO TAKE OFF-CALENDAR THE MARCH 25, 2021 CONTINUED HEARING RELATED TO THE NARROW ISSUE DISCUSSED AT THE PRIOR HEARING ON FRANK'S MOTION TO DISMISS THE COUNTER-CLAIM FILED 3-23-21**

Tentative Ruling:

Tentative for 2/25/21:

This is counter/cross defendants Jason Frank Law PLC's and Jason Frank's (Mr. Frank or collectively "Franks") motion to dismiss the counterclaims brought by debtor and counter/cross claimant Christine Carlin ("Ms. Carlin" or "Debtor") for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Debtor opposes the motion.

1. Factual Background

Debtor filed these counterclaims against the Franks for damages related to several alleged breaches of her privacy including, but not limited to, third parties impersonating her in phone calls to US Bank and Capital One and obtaining her private banking information. Debtor also alleges that a third party impersonated her husband in a call to Volkswagen Credit. Additionally, the party allegedly impersonating Debtor attempted to break into online accounts including her American Express and Capital One accounts. Based on the context, timing, and facts surrounding these alleged privacy breaches, Debtor believes they were perpetrated by Mr. Frank and/or his agents at his direction and on his behalf. These alleged intrusions all occurred shortly after

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CONT... Christine Carlin **Chapter 7**

the Superior Court signed Mr. Frank's turnover order on January 9, 2020 as follows:

Date and alleged occurrence:

December 2019 Mr. Frank files a motion to compel production of Ms. Carlin's bank records.

January 7, 2020 Superior Court grants Franks' Proposed Turnover Order requiring Ms. Carlin to turn over money Transferred to her by her former husband, Michael Avenatti ("Avenatti").

January 9, 2020 Superior Court signs order denying Mr. Frank's motion to compel Ms. Carlin to turn her bank records over to him.

January 9, 2020 Superior Court signs Mr. Frank's proposed turnover order requiring Ms. Carlin to turnover money transferred to her from Avenatti.

January 9, 2020 (2:11 P.M.) Imposter attempts access to Ms. Carlin's American Express Online Account.

January 9, 2020 (2:48 P.M.) Imposter calls US Bank pretending to be Ms. Carlin and obtains personal banking information.

January 10, 2020 Imposter calls Volkswagen Credit pretending to be Mr. Carlin and obtains information on his bank accounts including the USAA Account.

January 11, 2020 Imposter calls Capital One pretending to be Ms. Carlin.

February 28, 2020 Mr. Frank obtains a levy on the USAA account.

March 2020 Mr. Frank executes a levy on the USAA account that he

or his agents learned of by impersonating call to Volkswagen.

Debtor also brings these counterclaims to recover damages for the Franks' alleged misuse of collection procedure by treating the turnover order as license to use whatever collection methods Mr. Frank deemed most expedient in recovering assets in which Avenatti might have had an interest. Debtor argues the proper remedy for non-compliance with a turnover order is a sanction by court order, not aggressive and possibly unlawful collection activity. Debtor maintains that she never violated the turnover order. Debtor asserts that these alleged collection activities have caused damages in the form of emotional distress and loss of funds that were not the subject of the turnover order.

Based on the factual allegations above, the counterclaims contain the following causes of action:

(1) Unlawful Intrusion into Private Affairs;

(2) Violation of Common Law Right of Privacy.

(3) Violation of Constitutional Right of Privacy, Article 1 §1 of the California Constitution.

(4) Violation of Business and Professions Code §17200; and

(5) Abuse of Process

2. Motion to Dismiss Standards

FRCP 12(b)(6) requires a court to consider whether a complaint fails to state a claim upon which relief may be granted. When considering a motion under FRCP 12(b)(6), a court takes all the allegations of material fact as true

and construes them in the light most favorable to the nonmoving party. *Parks School of Business v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1995). A complaint should not be dismissed unless a plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *Id*. Motions to dismiss are viewed with disfavor in the federal courts because of the basic precept that the primary objective of the law is to obtain a determination of the merits of a claim. *Rennie & Laughlin, Inc. v. Chrysler Corporation,* 242 F.2d 208, 213 (9th Cir. 1957). There are cases that justify, or compel, granting a motion to dismiss. The line between totally unmeritorious claims and others must be carved out case by case by the judgment of trial judges, and that judgment should be exercised cautiously on such a motion. *Id.*

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-556, 127 S. Ct. 1955, 1964-65 (2007) A complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662 129 S. Ct. 1937, 1949 (2009) citing *Twombly*.

3. Are the Counterclaims Barred by The Litigation Privilege?

Franks argue that all of Debtor's counterclaims are barred by the litigation privilege provided in Cal. Civ. Code §47. They are likely correct.

"The privilege created by Civil Code section 47, though part of the statutory law dealing with defamation, has evolved through case law application into a rather broad protective device which attaches to various classes of persons and applies to types of publications and in types of actions not traditionally identified with the field of defamation." *Rosenthal v. Irell & Manella*, 135 Cal. App. 3d 121, 125 (1982). "'The absolute privilege attaches

to any publication that has any reasonable relation to the action and is made to achieve the objects of the litigation, even though published outside the courtroom and no function of the court or its officers is involved.'" *Id*. at 126 citing *Pettit v. Levy*, 28 Cal.App.3d 484, 489 (1972). The privilege also extends to *communications*, not just publications, that have "some relation" to a judicial proceeding. *Rubin v. Green*, 4 Cal. 4th 1187,1193 (1993); *Finton Construction Inc. v. Bidna & Keys APLC,* 238 Cal.App.4th 200, 211 (2015). "The initial departure from limiting the privilege to defamation actions came in *Albertson v. Raboff* 46 Cal.2d 375 [295 P.2d 405] (1956), where it was held that the privilege would serve to bar an action for disparagement of title based on the filing of a *lis pendens*." *Rosenthal*, 135 Cal. App. 3d at 125. Since then, "it has been applied to defeat tort actions based on publications in protected proceedings but grounded on differing theories of liability, to wit, abuse of process…intentional infliction of mental distress… fraud and negligence[.]" *Id*. (internal citations omitted). Statutory claims brought under Business and Professions Code §17200 are covered by §47. *Rubin*, 4 Cal. 4th at 1201-02. "[T]he litigation privilege bars all tort causes of action except malicious prosecution." *Jacob B v. County of Shasta*, 40 Cal. 4th 948, 960 (2007) citing *Kimmel v. Goland*, 51 Cal.3d 202, 209 (2002); *Silberg v. Anderson*, 50 Cal.3d 205, 215 (1990); and *Ribas v. Clark*, 38 Cal.3d 355, 365 (1985). "[T]he litigation privilege applies even to a constitutionally based privacy cause of action." *Jacob B v. County of Shasta*, 40 Cal. 4th at 961. "Obviously, if section 47(b) conflicted with California Constitution, article I, section 1, the statute would have to yield to the Constitution." *Id*. "But the statutory and constitutional provisions are not in conflict; they can and do coexist." *Id*. "[W]e are not aware of… [any authority relating to] the constitutional right to privacy that suggested any intent to limit the scope of this preexisting privilege or to create a right of privacy that would prevail over the privilege." *Id*. "The constitutional right to privacy has never been absolute; it is subject to a balancing of interests." *Id*. "'Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.'" *Id*. citing *Hill v. National Collegiate Athletic Assn.* 7

Cal.4th 1, 37-38 (1994). "Among the competing interests against which the privacy right must be balanced is the longstanding litigation privilege." *Jacob B v. County of Shasta,* 40 Cal. 4th at 962. "In adopting the litigation privilege, the *Legislature* has already done the balancing." *Id*. (Italics in original) "Litigants and witnesses could never be free of 'fear of being harassed subsequently by derivative tort actions' if the privilege applied only in some cases but not others." *Id*. (internal citation omitted). "This policy caused us to conclude that the litigation privilege bars all common law and statutory causes of action for invasion of privacy." *Id*. "It applies equally to a constitutionally based cause of action for invasion of privacy. The same compelling need to afford free access to the courts exists whatever label is given to a privacy cause of action." *Id*. The privilege cannot and should not be disregarded simply by pleading around the statute. *Id.*

Here, Debtor attempts to distinguish this case from the cases cited above, mainly *Ribas* and *Jacob B*. For example, Debtor notes that in *Ribas,* the court found that the litigation privilege applied only to statements made in an arbitration hearing, not to illegal eavesdropping. Debtor argues that eavesdropping is analogous to Mr. Frank allegedly impersonating her to gain access to her financial records. But the court notes that the penal code sections (Penal Code §§ 631 and 637.2) implicated in *Ribas* explicitly provided for a monetary remedy for victims of violations of that chapter ($3,000 [now $5,000] or three times victim's actual damages, whichever is greater) and an avenue to bring forth an action to recover those damages. *Ribas*, 38 Cal. 3d at 364 citing Penal Code §637.2. Debtor's attempts to distinguish the facts do not convince the court that her causes of action fit within the extremely narrow exceptions to Cal. Civ. Code §47. Indeed, the caselaw instructs the court to find that the litigation privilege is a bar against *all* tort actions except malicious prosecution. Debtor's only real hope of preserving her tort causes of action are to argue that Mr. Frank's alleged conduct does not qualify as a communication having at least "some relation" to a judicial proceeding. It seems rather obvious that, even if Debtor's allegations are true, Mr. Frank was attempting to gain information from

Debtor's financial institutions subject to a turnover order. Thus, such conduct would appear to have "some relation" to a judicial proceeding. Normally, as this is a Rule 12(b)(6) motion, all doubts are to be resolved in favor of Debtor as the nonmovant. However, relevant caselaw also instructs the court to resolve doubts in favor of applying the litigation privilege. See *Finton Construction Inc.,* 238 Cal.App.4th at 212 ("'Any doubt about whether the privilege applies is resolved in favor of applying it. [Citation.]'").

The court is not unsympathetic to Debtor's grievances, and the allegations, taken as true, are quite shocking and almost certainly not countenanced by any order of any court. They may also violate ethical constraints upon lawyers. However, courts in California seem to have decided that even tort actions based upon common law or constitutional violations of privacy interests must yield to the litigation privilege and the policy interests contemplated by Cal. Civ. Code §47. Debtor is not without remedies. For example, although her tort actions may be barred, there does not seem to be any barrier to seeking an order to show cause for sanctions from the court who issued the turnover order, which would possibly force Mr. Frank to either deny or justify his alleged actions. After all, it would seem an absurd result to give litigants free reign to behave unlawfully so long as their misconduct had some tenuous connection to a judicial proceeding. Unfortunately for Debtor, both the legislature and the courts have decided that in situations such as this, causes of action in tort are generally not maintainable.

It is plausible that Mr. Frank's alleged conduct implicates at least one criminal statute (Penal Code §530.5(c)(1)) [identity theft]. Unfortunately, Debtor did not include that as a cause of action in her counterclaim and the alleged violation of that penal statute only appears in her opposition to this motion. Debtor also does not cite any direct authority that alleged violations of Penal Code §530.5(c)(1) are immune from the litigation privilege, or even that victims have standing to prosecute thereunder whether criminally or civilly. As noted earlier, the *Ribas* court, analyzing whether a violation of Penal Code § 637.2 might be immune from the litigation privilege in Cal. Civ. Code. §47,

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CONT... Christine Carlin **Chapter 7**

noted that §637.2 explicitly included a monetary remedy for victims and an avenue to bring such claims. No such monetary remedy is provided for in § 530.5(c)(1), or anywhere else in the statute. The statute does provide for fines, but the court does not read that to equate to a remedy for victims in the same way as §637.2. A violation of Penal Code §530.5(c)(1) may be the sole province of the District Attorney. But, as the causes of action are pled as torts, Debtor's counterclaim must fail as barred by the far-reaching litigation privilege covered by Cal. Civ. Code §47. Moreover, the court does not see how it can be amended to cure this deficiency so leave to amend is denied.

Grant without leave to amend.

Party Information

Debtor(s):

Christine Carlin	Represented By Misty A Perry Isaacson

Defendant(s):

Christine Carlin	Represented By Brian C Carlin

Plaintiff(s):

Jason Frank Law PLC, a	Represented By Timothy C Aires

Trustee(s):

Thomas H Casey (TR)	Pro Se

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8:13-20028 Tara Jakubaitis **Chapter 7**

Adv#: 8:15-01426 Marshack v. Jakubaitis

#16.00 Defendant's Motion For Judgment On The Pleadings Pursuant To FRCP 12(C)
(cont'd from 1-28-21)

Docket 243

Tentative Ruling:

Tentative for 3/25/21:

At the last hearing on this motion, the court acquiesced to the requested additional briefing on the narrow issue of whether Tara intentionally concealed property of her estate, and specifically, whether she did so using corporate entities such as WeCosign, Inc. and/or WeCosign Services, Inc. (and possibly others). Unfortunately, the additional briefing did not bring much clarity. The supplemental briefs read very much like the original briefs in this motion, including some familiar case law, with only a few new details. For example, Trustee is now arguing (more explicitly) that WeCosign Services, Inc. was really nothing more than Tara's alter ego. Trustee alleges that Tara was the sole signatory on WeCosign, Inc. and WeCosign Services, Inc.'s corporate bank accounts, and she allegedly comingled personal and corporate assets in those accounts, and used them as piggy banks without observing any corporate formalities whatsoever. These are arguments that have been advanced several times before and even with Trustee's additional briefing (and accompanying exhibits), the court remains unconvinced by Trustee's arguments. The problem is that the complaint, even after amendments, has never contained an alter ego theory of relief. The problem identified at the last hearing is that in order to have survived the statute of repose found at §727(d)(2) and (e) the debtor, Tara Jakubaitis, would have to have been entitled to possession of "property of the estate" and that most logically means of her estate, not the estate of WeCosign or WeCosign Services or some related corporation.

The only development of consequence is that Trustee now wants leave to amend to add the alter ego theory of liability as he has apparently

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CONT... Tara Jakubaitis **Chapter 7**

embraced the court's passing observation in the last tentative that an alter ego theory might theoretically have saved the case. There are at least three problems with leave now to amend: (1) This is not a rule 15 motion to amend. It is rather Plaintiff's attempt to come up with more reasons why yet more amendments ought to be allowed to escape the implications of what is before the court as explained last time; (2) This is not a new case, and there are apparently no new facts that were not known years ago. The adversary proceeding is about five years old and the bankruptcy case is over seven years old, with a no asset report filed long ago. WeCosign was itself a debtor whose case was closed some six years ago. The alter ego theory of liability is not some obscure or esoteric legal doctrine. Trustee's dogged persistence and determination throughout the pendency of this case would suggest that if he thought alter ego were a viable theory for including WeCosign Services, Inc.'s assets (or those of any other corporation) within the definition of property of Tara's estate, he would have (should have) pursued that theory years ago; (3) Related to the first reason, at this very late stage in the process, it would seem to unfairly prejudice Tara to allow Trustee to amend his complaint yet again to include a new cause of action available to him long ago. In other words, it appears that Trustee has a laches problem. After all, also on today's calendar is an oft-continued pretrial conference where normally one would expect a trial date to be imminently set. The suggestion that we should now go back to first base on this case to pursue theories not included in the pleadings and reopen discovery at this very late date is not well-received.

All cases must end. Even this one. The court has indulged Trustee and given him many bites at the apple. Even with the benefit of the many doubts in this case, Trustee has not demonstrated a clearly viable cause of action under section 727(d). Therefore, the court sees no reason to depart from the initial tentative posted on this motion.

Grant Rule 12(c) motion.

Tentative for 1/28/21:

11:00 AM

CONT... Tara Jakubaitis **Chapter 7**

This is Defendant and Debtor, Tara Jakubaitis' ("Defendant" or "Debtor") Fed. R. Civ. P. 12(c) motion for judgment on the pleadings. The motion is opposed by the chapter 7 trustee, Richard Marshack ("Trustee" or "Plaintiff").

Plaintiff's first amended complaint was filed on May 13, 2016, and to the court's knowledge, has not been amended since. The first amended complaint sought the following relief:

1. Turnover of estate property, including cash, bank accounts, vehicles (namely a Corvette), and a United States Patent pursuant to 11 U.S.C. §542.

2. Revocation of discharge for alleged intentional failure to report their interest in several assets including bank accounts, vehicles, and a United States Patent pursuant to 11 U.S.C. §727(d)(1).

3. Revocation of discharge pursuant to 11 U.S.C. §727(d)(2) for failure to disclose and turnover the Bui judgment obtained post-petition by Frank Jakubaitis.

This latest motion is brought by Defendant on the grounds that significant events have transpired and coalesced since the last time the court heard a dispositive motion in this case. In particular, they allegedly are: (1) dismissal of Plaintiff's turnover cause of action; (2) this court's granting dismissal of Mr. Jakubaitis from this adversary proceeding due to lack of subject matter jurisdiction; (3) the finding that the Bui judgment was void; (4) the evidence suggesting that neither Debtor nor Frank ever owned a patent; (5) the concession that the Corvette once asserted to be property of the estate, in fact, did not exist; and (6) the Trustee's filing of a no asset report in 2017 that remains operative to this day. Furthermore, although previous attempts from several years ago raising the statute of limitations (or of repose) found in 11 U.S.C. §727(e) as a dispositive issue in a 12(b)(6) context have failed, Defendant asserts that the current record clearly demonstrates the righteousness of her position. It is worth noting that, as far as the court is aware, and Plaintiff appears to confirm in his opposition, the complaint has not been amended since the first amended complaint was filed in May of 2016.

A motion for judgment on the pleadings may be granted only if, taking

all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. *Owens v. Kaiser Found. Health Plan, Inc*., 244 F.3d 708, 713 (9th Cir. 2001); *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). For purposes of a Rule 12(c) motion, the allegations of the non-moving party are accepted as true and construed in the light most favorable to the non-moving party, and the allegations of the moving party are assumed to be false. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989); *Fleming* at 925. In some ways this motion is more properly brought under Rule 56 as it relies in part on evidence and points extraneous to the pleadings. To the extent that is true the court will construe this as a motion for summary judgment. Using this standard, the points raised below are considered.

1. Timeliness of the Motion

As a preliminary matter, Plaintiff asserts that this motion is untimely because it was filed after the last date to file pre-trial motions as set by this court's scheduling order. According to this court's scheduling order, the last day to file pre-trial motions was December 15, 2019, and this motion was not filed until December 2, 2020. Plaintiff filed an *ex parte* application on December 23, 2020 requesting one of two forms of relief: (1) strike the motion as untimely pursuant to the scheduling order; or (2) continue the hearing on this motion to January 28, 2021. The court granted the latter. Defendant argues that the court's election implies the court's intent to hear the motion on its merits instead of upon a procedural issue. Indeed, the order continuing the hearing on this motion specifically crossed out the portion discussing denial of the motion as untimely. But Defendant reads way too much into this. The court merely chose to consider the issue in the wider context, to include the procedural question. As the court has the inherent power under 11 U.S.C. § 105(a) to manage its own dockets, including issuing new orders that supersede older orders, this motion is considered even if not timely. Mainly the court wants to consider what may be a fundamental problem with this case at its very heart which does not go away merely because the Defendant was late in raising it. Also, Defendant is correct that the once larger array of supposed assets has dwindled significantly which may then justify a closer

look at the remaining statute of repose question.

2. Dismissal of Plaintiff's Turnover Cause of Action Under 11 U.S.C. §542

This court dismissed this cause of action by order issued March 13, 2020. The court did so because of its expressed skepticism that a promissory note on a loan to an entity owned and controlled by Debtor and Frank was properly subject to turnover. The court instead suggested that the proper remedy was a claim for damages. This same order also categorically dismissed Frank Jakubaitis from this adversary proceeding.

3. The Bui Judgment

Plaintiff previously asserted that that the so-called Bui judgment, which Frank Jakubaitis apparently obtained in May of 2015, was fraudulently concealed and is grounds for revocation of discharge under §727(d)(2). However, this issue became largely moot in March of 2017 when the Bui judgment was voided and became worthless. *See* Defendant's Request for Judicial Notice, Ex. 6. Defendant cites *Sole Energy Co. v. Hodges*, 128 Cal.App.4th 199, 210 (2005) for the proposition that a void judgment cannot be used as the basis of any right whatsoever. Indeed, the *Hodges* court observed, "A void judgment [or order] is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone."

It could be argued that §727(d) is not concerned about the value of a given asset, rather it is concerned with deterring debtors from fraudulently concealing assets of the estate, but that argument is not raised in connection with the Bui judgment. In any case, Defendant argues somewhat convincingly that the Bui judgment, worthless or not, would have part of *Frank's* bankruptcy estate, as it was his judgment, not Defendant's. Additionally, the court is mindful of the purpose of the §727(d) sanction, that is, to motivate debtors to

be forthright and fulsome in their disclosure on their schedules and to their trustees on pain of losing their discharge. This implies that the assets to be disclosed must have at least some inherent value, as no schedule is so complete as to mention every single worthless piece of junk or hypothetical right or claim which, as it developed in this case, fits the definition of the Bui judgment. Certainly, denial of a discharge based on a wife's failure to disclose her husband's worthless judgment against a third person, which then later goes away as improperly obtained in the first place, rests on a very infirm foundation. Plaintiff's opposition appears to back off on his pursuit of the Bui judgment, which lends additional support to the mootness argument.

4. The Corvette

Plaintiff also alleged that either Defendant, or possibly Frank, was concealing a Corvette from the Trustee. An insurance form concerning a Corvette held in the name of Frank Jakubaitis was used as evidence. However, a transcript of a September 5, 2019 hearing on a motion for default judgment in Frank's adversary proceeding shows that after investigating the insurance lead, Mr. Shirdel, counsel for the plaintiff, Carlos Padilla, III, conceded that Frank never owned the Corvette in question. See Defendant's Request for Judicial Notice, Ex. 7. Mr. Shirdel is also counsel for Trustee in this adversary proceeding.

5. The Patent

The last tangible asset believed by Plaintiff to have been fraudulently concealed was a U.S. Patent. Plaintiff's investigation appears to have been spurred by the existence of a Patent Application. However, the patent application shows that the application was abandoned for failure to respond to an office action in 2007. See Defendant's Request for Judicial Notice, Ex. 5. To the court's knowledge, Plaintiff has not come forward with any additional evidence suggesting the patent ever issued.

6. Cash Accounts

Plaintiff's first amended complaint references concealed cash accounts, but the complaint is extremely light on specifics. Somewhat surprisingly, Plaintiff's opposition to this motion is much more specific in that it includes the names of the various entities allegedly involved, and approximate amounts of monies allegedly received and/or concealed by Defendant. In any case, as Defendant points out, much of the alleged wrongdoing was done through Wecosign, Inc., a corporation owned by the debtors, which filed its own bankruptcy petition in 2014. Thus, it is likely that assets transferred to or through that entity would be property of the estate of Wecosign, Inc., not Defendant's estate. That has large significance in the court's reading of § 727(d), as discussed below.

7. The No Asset Report(s)

Defendant points out that Plaintiff filed a no asset report on March 30, 2017. The report states the trustee has abandoned assets, determined exempt assets, and shows the scheduled claims subject to discharge. In opposing this motion, Plaintiff urges the court to disregard the no asset report as being of only limited relevance. However, although inconvenient for Plaintiff, it does seem particularly relevant that Plaintiff, despite all these allegations of concealed assets, has not withdrawn his nearly 4-year-old no asset report. Certainly, an experienced trustee such as Plaintiff would know that is an option available to him. Thus, the court finds the operative status of the no asset report not only relevant, but rather telling. Maybe even more telling is the fact that Mr. Casey, the trustee in the Wecosign estate also has failed to withdraw his no asset report as well.

8. Plaintiff's Claims Are Likely Time-Barred

Defendant has maintained for some time now that the complaint in this adversary proceeding is untimely as the statute in question, §727 has some rather rigid and unforgiving deadlines.

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CONT... Tara Jakubaitis **Chapter 7**

Under 11 U.S.C. §727(e):

"The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed."

Here, it appears that nearly all of the allegations in the first amended complaint, including the false oaths, concealment of the Corvette and the U.S. Patent, would fall under §727(d)(1), which covers situations in which a discharge is "obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge[.]" Assets of the estate existing before the petition, but not disclosed, would seemingly fit the §727(d)(1) definition, and from what the court can discern, would encompass all of the above assets with the possible exception of the cash accounts and Bui judgment. As noted above, this section has a 1-year period to bring an action from the time of discharge. Defendant received her discharge on August 11, 2014. The complaint initiating this adversary proceeding was not filed until October 28, 2015, which is well outside the 1-year statute of limitations. It could be argued that there is a case for equitable tolling of the otherwise strict time limits imposed by §727(e). Although many statutes of limitations provide for equitable tolling, courts in the Ninth Circuit and beyond, including secondary sources such as Collier on Bankruptcy have opined that equitable tolling does not apply to §727(d)(1) claims. See *Towers v. Boyd (In re Boyd)*, 243 B.R. 756, 764-65 (N.D. Cal. 2000) ("Case law and treatises almost unanimously favor reading sections 727(d)(1) and (e)(1) as prohibitive of equitable tolling.") These authorities construe §727(e) as a statute of repose, i.e. one providing inalterable relief from action irrespective of future events. *See Apex Wholesale Inc. v. Blanchard (In re Blanchard),* 241 B.R 461, 464 (Bankr. S.D. Cal. 1999) ("Section 727(e)(2) is a statute of repose and, as such, is not subject to the doctrine of equitable tolling."). The

court is aware of a concurring opinion in *Weil v. Elliott*, 859 F.3d 812, 815 (9th Cir. 2017) where Judge Christen opined that §727(e)(1) is a statute of limitations, and not a statute of repose. However, as discussed above, whether §727(e) is a statute of limitations or a statute of repose will likely make little difference in this particular case.

However, causes of action brought under §727(d)(2) have more forgiving deadlines under §727(e). Under §727(d)(2), a revocation action may be brought if "the debtor acquired property that is *property of the estate*, or became entitled to acquire property that would be *property of the estate*, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee[.]" (italics added) If applicable this provision would save the present action as the case is not yet closed.

From the face of the complaint, it is not obvious what specific property would fall under §727(d)(2) other than the Bui Judgment, which is named as such in the first amended complaint. However, as noted, the Bui judgment was subsequently voided. After the dismissal of the §542 claims against Defendant, the admission that the Corvette never existed, the evidence that the U.S. Patent was never more than just an abandoned application, and the voided Bui Judgment, what else is left? One could surmise that the bank accounts set up and monies received through the various corporate entities controlled by Defendant and her husband were concealed, but as discussed above, the main entity involved in those allegedly fraudulent transactions, Wecosign, Inc., has its own bankruptcy estate. In any case, it appears from the complaint that most, if not all the money Defendant directly received through those transactions would have been received pre-petition, making it likely to fall under §727(d)(1). Thus, it is not clear what, if anything, is left upon which Plaintiff's revocation action might attach.

That said, the court is unclear about the role of the other related entities such as Wecosign Services, Inc. and PNC National, Inc. But from what the first amended complaint suggests, those companies were operated essentially in the same manner as Wecosign, Inc., which is to say, primarily for the personal benefit of Defendant and Frank. What gives the court some pause here, is the lack of a clear timeline (at least not clear from the first

amended complaint). It would appear that the alleged misconduct involving these other entities also occurred mostly, if not entirely pre-petition. Plaintiff's opposition does refer to the sum of $113,000 allegedly transferred from Wecosign Services, Inc. to Defendant both shortly before and shortly after filing her petition. It seems payments making up this sum were made in separate installments. The way this is presented in the opposition uses language that tries to shoehorn it into §727(d)(2). The court is, of course, obliged to look at the alleged facts in the light most favorable to Plaintiff as the non-moving party. However, the court notes that these allegations are not actually in the first amended complaint and it is unknown when Plaintiff became of aware of these alleged transactions. One supposes it must have been after the filing of the no asset report in 2017. But then, again, why was the no asset report not withdrawn? In any case, the court is willing to hear argument on this point.

9. Property of Which Estate?

But a more fundamental problem arises. If the timing on the cash account withdrawals is all or at least partly *post-petition*, in an apparent effort to fit within §727(d)(2)'s more flexible statute of repose provided in §727(e)(2), one must ask what is meant by the language italicized above, "property of the estate…?" The most likely reading of this language would mean property of the debtor's estate because that is the property the trustee appointed in the debtor's case is authorized to administer. Also, it is possible for a debtor to engage in the proscribed conduct in a separate bankruptcy case, but still obtain a discharge in their own case honestly, and thus, trigger neither subsection (d)(1) nor (d)(2). This view is shared by other courts as well. "It would be a very strained reading of [§727(d)(2)] to conclude that it meant any bankruptcy estate, and not just the debtor's own." *Thompson v. Thompson,* 561 B.R. 581, 596-97 (Bankr. N.D. Ga. 2016) citing *All Points Capital Corp. v. Stancil (In re Stancil)*, 2012 WL 4116505, at *2 (Bankr. E.D.N.C. Sept. 18, 2012) ("Because the debtor did not engage in post-petition conduct in connection with his own individual chapter 7 case prohibited by § 727(d)(2), the court cannot revoke his discharge.").

But it seems the cash accounts from the Wecosign, Inc. were from another estate, which Mr. Marshack would not in any event have been authorized to administer even if they had been revealed. Plaintiff might have saved his case had he alleged that Wecosign, Inc., and the other related entities, were the alter ego of the debtor(s). To be logically consistent, plaintiff would need to prove that the corporation had no separate existence, such that its monies are in equity the individual's property, and, as a result, that it should be turned over as "property of the estate." That seems a stretch here. For example, could not the alleged behavior amount to corporate malfeasance without equating to an obliteration of the corporation under an alter ego theory? To be clear, in the court's view, the first amended complaint appears to allege facts on the outskirts of an alter ego theory but does not include certain necessary allegations as described above. If such allegations can, in good faith, be made, then one is obliged to wonder, why has the complaint not been amended since 2016? Despite some skepticism, the court is still willing to hear argument on this point.

10. Conclusion

In sum, Plaintiff's opposition raises more questions than it answers, which is to say, is of little help in resolving anything. By contrast, Defendant's motion appears to provide several answers to lingering questions about this case, and unlike the opposition, is supported by documentation in the record of this case or related cases. Where Defendant has submitted extrinsic evidence in support of the motion, the court notes that Plaintiff has either tacitly admitted the authenticity and accuracy of such evidence or has simply failed to challenge the same. In any case, the court is comfortable allowing such evidence to augment the record. In doing so, this motion might be more akin to a motion for summary judgment under Rule 56. See *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996) ("Because the district court has in this case considered evidence outside the pleadings, we treat Brown's motion as one for summary judgment. See Fed. R. Civ. P. 12(c).")

The amount of time this adversary proceeding has gone on is also

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relevant. Defendant received her discharge more than six years ago. The complaint initiating this adversary proceeding was filed more than 5 years ago. The Plaintiff's 'no asset report' remains operative nearly four years after it was filed. The court has indulged Plaintiff's doggedly determined efforts to root out assets that may exist, but at some point, the plug must be pulled, especially when those efforts have turned up more rocks and no gold.

To conclude, the bulk of the causes of action in the first amended complaint appear to be time-barred by the rigidity of §727(e), and it is not obvious that the remaining causes of action, even those that can be charitably gleaned from the opposition to this motion, fit within the more flexible §727(d)(2) and its comparatively generous statute of limitations. Furthermore, Defendant has produced evidence, unchallenged by Plaintiff, that indicates that the key identifiable tangible assets were either worthless or non-existent, and what might have been relevant probably belonged to another estate under the administration of another trustee.

Grant

Party Information

Debtor(s):

Tara Jakubaitis — Represented By
Christopher P Walker
Fritz J Firman
Benjamin R Heston

Defendant(s):

Tara Jakubaitis — Represented By
Fritz J Firman

Plaintiff(s):

Richard Marshack — Represented By
Arash Shirdel

Trustee(s):

Richard A Marshack (TR) — Represented By

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

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Arash Shirdel

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8:13-20028 Tara Jakubaitis **Chapter 7**

Adv#: 8:15-01426 Marshack v. Jakubaitis et al

#17.00 PRE-TRIAL CONFERENCE RE: Adversary Complaint for 1. Turnover of Property of The Estate - 11 U.S.C. Section 542; 2. Avoidance of Fraudulent Transfer - 11 U.S.C. Section 544; 3. Revocation of Discharge - 11 U.S.C. Section 727(d)
(set at s/c held 8-15-19)
(cont'd from 1-28-21)

Docket 1

Tentative Ruling:

Tentative for 3/25/21:
See #16.

Tentative for 1/28/21:
That both sides' signature appear on a Joint Pre Trial Stipulation and Order is progress. The court would ask that the parties confer so as to decide whether exhibits can be accepted into evidence without dispute, particularly the list of deposits into and payments from the various accounts. If so what will otherwise become an exceedingly tedious trial can be greatly shortened. Of course, both sides would remain free to dispute the significance of the deposits or checks. Depending on resolution of these questions look to schedule trial about mid-summer.

Appearance required.

Tentative for 12/3/20:
It is more than disappointing that we still cannot accomplish even the simplest of tasks in this case, i.e. a joint pretrial stipulation. The court will order the two counsel to meet at a time and place to be set upon the record for purposes of combining the two unilateral stipulations into a useable joint

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pretrial stipulation. If the parties cannot agree then, as the LBRs contemplate, there shall be set forth a list of the areas of disagreement in the single document. The court expects that everything that can be agreed upon will be and that each side will extend its utmost cooperation. This is the last chance to do this right before sanctions are imposed which can include either /or striking of pleadings or monetary sanctions. Continue to January 28, 2021 @ 10:00 a.m. for further pretrial conference and evaluation of the effort. Appearance required.

Tentative for 9/24/20:

The court will spare all a long recital of the frustrations occasioned by the continued and dismal lack of cooperation in these related cases, or the parties' seeming indifference to either the court's orders or to the LBRs. The court will only state this is not the first time. Here we are, at the date of pretrial conference and we have nothing at all from the defendant, and what might be worse, no explanation either. So be it. Plaintiff's unilateral pretrial order is adopted. How the defendant can still make a case around those provisions is unclear. A trial date will be scheduled approximately three months hence. The court will hear argument whether this should be in person or via Zoom.

Tentative for 2/27/20:

This is supposed to be a pre-trial conference. Sadly, it is not that and this is hardly the first time in this series of cases where the court has been sorely frustrated.

As required by the LBRs, the parties were to have met and conferred in good faith to narrow the issues so that trial time could be focused on those items truly in dispute. Local Rule 7016-1 sets forth a very specific timeline and list of duties incumbent on each side. At LBR 7016-1(b)(1)(C) Plaintiff was to have initiated a meet and confer *at least 28 days* before the date set for the pre-trial conference. According to Defendant's papers, this did not occur 28 days before the originally scheduled pretrial conference of Feb. 6, *or*

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indeed at all until February 13 when Plaintiff reportedly filed his "Pretrial Stipulation" in which he claims it was Defendants who "refused to participate in the pretrial stipulation process" necessitating what is actually a unilateral stipulation. Defendant on the next day, February 14, filed his Unilateral Pretrial Stipulation. Defendant does acknowledge at his page 2, line1-2 that Plaintiff sent something over to Defendant on January 28, but it was reportedly "not complete in any respect." As to the original date of the Pretrial Conference of February 6, that was *very* late. Whether that document was anything close to what was later filed unilaterally on Feb. 13 is not clarified. But what is very clear is that these two unilateral "stipulations" are largely worthless in the main goal of narrowing issues inasmuch as the parties seem to be discussing two entirely different complaints. Defendant focuses on what the former trustee (now deceased) may have known about the existence of a loan undisclosed on the schedules made by Frank to WeCosign, Inc., which loan was reportedly worthless in any case, and about how that knowledge should be imputed to Plaintiff Marshack. But why the trustee's knowledge, imputed or otherwise, should justify an alleged misstatement or omission to list assets under oath, is never quite explained. One presumes Defendant will argue materiality. Plaintiff focuses on the alleged use of another corporation, Tara Pacific, as the repository of funds taken from WeCosign as an alleged fraudulent conveyance and then used by Frank and Tara as a piggy bank between 2010 and 2012 and upon alleged misstatements in the schedules about Tara's and Frank's actual average income. While this sounds like a fraudulent conveyance theory the gist seems to be that Tara and Frank were using ill-gotten gains to live on while denying in respective schedules that they had any income (or assets) thus comprising a false oath. There probably are connections between these different stories, but that is not made at all clear (and it must be made clear). Plaintiff's overlong "stipulation" is written more like a 'cut and paste' brief containing long tables with over 59 footnotes inserted. One presumes this represents a good faith compilation of bank records, but even that is left unclear. But the language used reads purely as advocacy, not an attempt to narrow the disputed facts in a way the other side

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can sign.

Buried in the Defendant's recitations (at page 4, ¶ 13) is the argument that the case should be dismissed as outside the statute of limitation (or statute of repose in Defendant's terms) described at §727(e)(1). Why this was not raised 50+ months ago when the action was filed by Rule 12(b) motion or otherwise is not explained. What the Defendant expects the court to do with this point now is also not explained.

In sum, this case is still a disorganized mess. This is not the first time the court has voiced its utter frustration with this series of cases. Rather than being ready for trial, we are very much still at the drawing board. The court is not happy about it as this is hardly a young case.

What is the remedy? The court could order sanctions against either side, or maybe both sides, and that would be richly deserved. The court could decide that Plaintiff as the party with the initial duty under the LBRs should suffer the brunt of just consequences by a dismissal, as the ultimate sanction. But however tedious and frustrating this has become the court would rather see these cases decided on their merits (if any) *if that is possible*. But what the court will not do is to further indulge these parties in disobeying the LBRs and generally continuing to shamble along, never getting anywhere. Therefore, **it is ordered**:

1. The parties will immediately meet and confer about reducing the two unilateral 'stipulations' into an intelligible, single, useful list of items not in dispute and therefore requiring no further litigation;

2. The resulting stipulation will be concise, user-friendly and focused on the actual legal issues to be tried;

3. The stipulation will contain a concise list of exhibits to be offered at trial identified by number for Plaintiff and letter for Defendant;

4. The parties will attempt in good faith to resolve any evidentiary

objections to admission of the exhibits, and if agreement cannot be reached, state concisely the reasons for or against admissibility;

5. The stipulation will contain a list of witnesses to be called by each side, with a very brief synopsis of the expected testimony;

6. All factual matters relevant and truly in dispute will be listed, by short paragraph;

7. All legal issues to be decided will be separately listed, by paragraph;

8. Any threshold issues such as Defendants argument about statute of repose will be separately listed along with a suggested means of resolving the issue; and

9. Both sides will estimate expected length of trial, mindful that the court requires all direct testimony by declaration with the witnesses available at trial for live cross and re-direct.

In sum the parties are to do their jobs. If the court's order is not followed *in enthusiastic good faith, and completely* with the goal of narrowing the issues, and if the resulting product is not a concise, user-friendly joint pretrial stipulation, the offending party or parties will be subject to severe sanctions which may include monetary awards and/or the striking or either the complaint or answer.

Continue about 60 days to accomplish the above.

Tentative for 8/15/19:
Status conference continued to October 24, 2019 at 10:00AM

Once the confusion over which action, which claim, and which defendant

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remains is cleared up, a series of deadlines will be appropriate to expedite resolution.

Tentative for 10/25/18:
See #12.

Tentative for 2/15/18:
Status?

Tentative for 1/25/18:
See #11, 12 and 13.

Tentative for 9/14/17:
Why no status report from defendant? Should trial be scheduled before discovery is complete?

Tentative for 7/13/17:
It looks like discovery disputes must be resolved before any hard dates can be set.

Tentative for 5/4/17:
Status conference continued to June 29, 2017 at 10:00 a.m. Do deadlines make sense at this juncture given the ongoing disputes over even commencing discovery?

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Tentative for 3/23/17:
See #13.1

Tentative for 12/8/16:
No status report?

Tentative for 3/10/16:
See #6 and 7.

Tentative for 1/14/16:
Status conference continued to March 10, 2016 at 11:00 a.m. to coincide with motion to dismiss.

Party Information

Debtor(s):

Tara Jakubaitis	Represented By Christopher P Walker Fritz J Firman Benjamin R Heston

Defendant(s):

Tara Jakubaitis	Pro Se
Frank Jakubaitis	Pro Se

Plaintiff(s):

Richard Marshack	Represented By Arash Shirdel

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, March 25, 2021 **Hearing Room 5B**

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Trustee(s):

Richard A Marshack (TR)	Pro Se
Richard A Marshack (TR)	Pro Se

U.S. Trustee(s):

United States Trustee (SA)	Pro Se